IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 12298 of 1994

For Approval and Signature:

THE HON'BLE SMT. JUSTICE ABHILASHA KUMARI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MUKESHKUMAR R VALAND - Petitioner(s)
Versus
MANAGING DIRECTOR & 1 - Respondent(s)

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Appearance :
Ms.Roma Fidelis for MR YN OZA for Petitioner
Mr.Avinash R.Thacker for MR JR NANAVATI for Respondent No.1
RULE SERVED BY DS for Respondent No. 2

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CORAM : THE HON'BLE SMT. JUSTICE ABHILASHA KUMARI

Date : 02/03/2006

ORAL JUDGMENT

1. The petitioner has invoked the extra ordinary jurisdiction of this Court under Article 226 of the Constitution of India, challenging the impugned order of removal passed by the respondent Managing Director,Gujarat State Seeds Corporation Ltd. dated 14.6.94. The petitioner further challenges the order dated 23.9.94 vide which the appellate authority has rejected the appeal filed by him against the order of removal.

2. Briefly stated, the facts giving rise to the present petition are that the petitioner was serving with the respondent Corporation as a Gujarati Typist. He was appointed on probation in the year 1982, to the post of Peon, against which post he later came to be confirmed. Thereafter, he was appointed as a Gujarati Typist initially on probation, and later on his services were regularised. Hence, it is the case of the petitioner that he has been serving the respondent Corporation for more than 12 years.

3. The petitioner was served with a charge-sheet dated 16.11.1993 for remaining absent for a period of 161 days, which was considered as leave without pay. He gave his reply to the charge-sheet which is dated 30.11.93, explaining the circumstances which forced him to remain absent. The respondent Corporation proceeded with the departmental inquiry and ultimately, inflicted the punishment of removal from service upon the petitioner. Thereupon, the petitioner preferred an appeal as per Rules, against the order of removal, which was also rejected.

4. I have heard Ms.Roma Fidelis, learned counsel appearing for the petitioner and Mr.A.R.Thacker, learned counsel appearing for the respondent No.1 and have scrutinized the available material on record. It is submitted by Ms.Roma Fidelis that the action of the respondent No.1 in removing the petitioner from service is violative of Articles 14 and 16 of the Constitution of India. The petitioner was not given reasonable opportunity to defend his case in the departmental inquiry, inasmuch as he was not permitted to cross-examine the witnesses or given the

assistance of a friend. Moreover, he was not supplied with the documents on which the respondent – authority has placed reliance. It is further submitted on behalf of the petitioner, that the principles of natural justice have been violated and that it is also a case of double jeopardy, because the petitioner was already punished for the lapses which have been mentioned in the charge-sheet. The learned counsel for the petitioner has not laid much stress upon these arguments but has concentrated mostly on the ground, that the removal from service of the petitioner is bad in law, since the punishment inflicted upon him is grossly disproportionate to the misconduct committed by him. The petitioner had worked for 12 years sincerely and honestly, and due to his absence of 161 days, which is not that serious a misconduct, he should not have been removed from service. This punishment is too harsh and this court should, therefore, interfere with the same. In support of her contention Ms.Roma Fidelis has relied upon **(2003) 5 SCC 200 Secretary, School Committee, Thiruvalluvar Higher Secondary School v. Government of T.N.and others).** In this case, the factual matrix

is entirely different from that in the present case. This is a case in which a departmental inquiry took place against the delinquent who, according to the Chief Educational Officer, was a psychic person. On this ground, the Chief Educational Officer passed an order refusing to terminate the services of the delinquent on the ground that the allegations which constituted the foundation for the proposed order of termination, were not so grave as to warrant a punishment like dismissal. The management of the school in question appealed against this order under Section 41 of the Tamil Nadu Recognised Private Schools (Regulation) Act, 1973 to the Joint Director of School Education and ultimately, the matter came before the Madras High Court. The learned Single Judge of that court was of the view that as per the requirements of Section 22(1) of the said Act, prior approval for effecting termination was necessary. This order was further carried in appeal and, it was in this context that the Supreme Court entered upon adjudication in this matter. Thus the entire case revolves around the correct interpretation of the provisions of the concerned Act and the observations

made by the Supreme Court are also in that context. Therefore, this decision will have no bearing on the facts of the present case.

5. Further reliance has been placed on **2001(2) GCD 953 (Guj) (Rajesh M.Jani v. Registrar, Metropolitan Magistrate Court, Ahmedabad and another)** in which a Division Bench of this Court, in the peculiar facts and circumstances of that case, substituted the penalty of termination with that of withholding of two increments without future effect. In this case, the Division Bench, in para 6 thereof, has reiterated the settled proposition of law in the realm of service jurisprudence, that ordinarily the order of the disciplinary authority should not be interfered with in the matter of punishment. However, it has gone to say that if the Court finds that the imposition of punishment qua the type of delinquency is disproportionate, the court has the power to take into consideration the doctrine of proportionality and interfere with the same. In para 7 of the same judgment, while discussing the reason why it was necessary to interfere, the Division Bench has made

it clear that they have come to their conclusion in the light of the facts of that particular case.

6. Another judgment cited by learned counsel for the petitioner in support of the above contention is **1985 GLH 940 (Sardarsingh Devisingh v. Dist.Supdt.of Police, Sabarkantha and Others).** The facts of that case are also totally different from those in the present one, since the Court in the case of Sardarsingh Devisingh v. Dist.Supdt.of Police, Sabarkantha and Others (Supra) has clearly pointed out in para 7 that in that case no punishment was imposed for remaining on leave. The Court also pointed out that an opportunity to improve whether would be a futile exercise must be considered by the authority. In the facts and circumstances of that case, since the punishment was imposed in the past, and no opportunity was given to the delinquent to improve, the learned Single Judge thought it fit to give an opportunity to him while imposing a lesser punishment. In the present case however, several opportunities were given to the petitioner to improve his conduct and the petitioner has also admitted to

this in the reply to the charge-sheet filed by him. It is only after giving him several opportunities and show cause notices that the extreme penalty of removal from service was imposed upon him.

7. Shri A.R.Thacker, learned counsel for the respondent No.1, has submitted that the petitioner has given his reply to the charge-sheet and the departmental inquiry against him was conducted in accordance with the rules, by the Inquiry Officer. The petitioner was given all documents as sought for by him and the Inquiry Officer has given him every opportunity of hearing at the inquiry. The principles of natural justice have been observed and it is not a case of double jeopardy, as no punishment has been inflicted upon the petitioner, except the present one. Show cause notices do not constitute punishment and it cannot be construed as double jeopardy. It is further submitted on behalf of the respondent Corporation, that it was only after numerous opportunities and show cause notices were given to the petitioner to improve, that the enquiry was conducted and the punishment of removal was meted out

to him. In these circumstances, it cannot be termed to be harsh or disproportionate.

8. Upon weighing the respective contentions of the parties upon an even scale and after going through the entire material on record, as well as the judgments cited before me, it is clear that the petitioner was served with show cause notices five times. This is evident from the charge-sheet annexed as Annexure “C” to the petition. The petitioner was in the habit of remaining absent without leave, in an unauthorised manner. He was given show cause notice under Rule 66(6) of the Gujarat Civil Services Rules but in spite of this, he did not improve his conduct. He has remained absent for a period of 161 days within a span of 15 months. Under Rule 66, the penalties, which can be imposed, are enumerated, which also include the penalty of removal from service. The petitioner, in reply dated 30.11.93, admitted his unauthorized absence from duty and the reasons given by him are his domestic circumstances. Further, he has also admitted that he has been served with show cause notices in the past. A perusal of

the report of the Inquiry Officer annexed as Annexure “X” to the reply filed by respondent No.1 reveals, that the petitioner was given full opportunity of defending himself and was supplied with the documents asked for by him. He has himself stated that he has received the documents which he has asked for, and besides these documents he does not require any other document. The documents, which were relied upon, have all been supplied to the petitioner. The reasons stated by the petitioner for his unauthorised absence are because of domestic circumstances and his own and his mother's ailment, which have all been considered by the Inquiry Officer in the report. The fact that show cause notices were given as many as five times to the petitioner, in spite of which there was no improvement in his conduct despite his assurances, and also the unsatisfactory nature of the reasons given in the reply filed by him to the show cause notices, led the Inquiry Officer to come to the conclusion regarding the guilt of the petitioner. Accordingly, the competent authority imposed the punishment of removal vide Annexure “A” to the writ petition, which was upheld by the appellate

authority.

9. As far as the contention of the learned counsel for the petitioner that no opportunity was given and the inquiry has not been conducted as per Rules is concerned, the same is not substantiated by the material on record. There is no procedural defect in the inquiry, and it is evident that the rules of natural justice have been observed and the documents relied upon have been supplied to the petitioner. Moreover, it is not a case of double jeopardy and it is not understood how and in what manner this argument has been raised, since it is after considering the various periods of unauthorised absence of the petitioner, for which he was given show cause notices, that the inquiry was started against him. Mere issuance of show cause notices can not be said to be a penalty and as such the argument of the learned counsel for the petitioner regarding double jeopardy against the petitioner cannot be accepted.

10. Much stress has been laid by the learned counsel

for the petitioner that the punishment of removal imposed upon the petitioner is grossly disproportionate. The law cited on behalf of the petitioner has also been discussed herein-above.

11. Mr.A.R.Thacker, learned counsel for the respondent No.1 has contended, that in the facts and circumstances of the case,the punishment of removal is not at all disproportionate and it is not a case in which this court should interfere on this ground. He has relied upon **(2003) 3 SCC 464 (Maan Singh v. Union of India and others).** This was also a case where the petitioner was dismissed from service after a departmental inquiry which found him guilty of unauthorised, long absence from duty. Rejecting the argument advanced in that case, to the effect that it is only in cases were the misconduct is of the gravest kind that an order of dismissal shall be made, the Supreme Court held that when the charge against the appellant is of habitual unauthorised absence for long periods on several occasions, the view taken by the disciplinary authority is justified.

12. Reliance has been placed by the learned counsel for the respondent No.1 on **(2006)1 SCC 589 (State of Rajasthan and another v. Mohd. Ayub Naz).** Relevant paragraphs of this judgment are quoted as under:

> "9. Absenteeism from office for a prolonged period of time without prior permission by government servants has become a principal cause of indiscipline which has greatly affected various government services. In order to mitigate the rampant absenteeism and willful absence from service without intimation to the Government, the Government of Rajasthan inserted Rule 86(3) in the Rajasthan Service Rules which contemplated that if a government servant remains wilfully absent for a period exceeding one month and if the charge of willful absence from duty is proved against him, he may be removed from service. In the instant case, opportunity was given to the respondent to contest the disciplinary proceedings. He also attended the inquiry. After going through the records, the learned Single Judge held that the admitted fact of absence was borne out from the record and that the respondent himself had admitted that he was absent for about 3 years. After holding so, the learned Single Judge committed a grave error that the respondent can be deemed to have retired after rendering of service of 20 years with all retiral benefits which may be available to him. In our opinion, the impugned order of removal from service is the only proper punishment to be awarded to the respondent herein who was willfully absent for 3 years without intimation to the Government. The facts and circumstances and the admission made by the respondent would clearly go to show that Rule 86(3) of the Rajasthan Service Rules is proved against him and, therefore, he may be removed from service.

10. This Court in Om Kumar v. Union of India while considering the quantum of punishment/ proportionality has observed that in determining the quantum, role of administrative authority is primary and that of court is secondary, confined to see if discretion exercised by the administrative authority caused excessive infringement of rights. In the instant case, the authorities have not omitted any relevant materials nor has any irrelevant fact been taken into account nor any illegality committed by the authority nor was the punishment awarded shockingly disproportionate. The punishment was awarded in the instant case after considering all the relevant materials, and, therefore, in our view, interference by the High Court on reduction of punishment of removal was not called for.

11. It was argued by learned counsel for the respondent that this Court while reviewing punishment and if it is satisfied that the Wednesbury principles are violated, it has normally to remit the matter to the administrative authorities for a fresh decision as to the quantum of punishment.We are unable to countenance the said submission. In the instant case, the disciplinary proceedings were initiated against the respondent in the year 1981 and the Division Bench disposed of the LPA only in December 2001. Therefore, there has been a long delay in the time taken by the disciplinary proceedings and in the time taken in the courts and, therefore, in such rare cases, this Court can substitute its own view as to the quantum of punishment.

12. In this context, we can usefully refer to B.C.Chaturvedi v. Union of India (three Judges)wherein this Court held thus: (AIR p.484)

“Ramaswamy,J. For himself and B.P.Jeevan Reddy,J.- Disciplinary authority, and on appeals, Appellate Authority are invested with the discretion to impose appropriate punishment keeping in view the magnitude or gravity of the misconduct. The High Court/Tribunal, while

exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the Appellate Authority shocks the conscience of the High Court/Tribunal, it would appropriately mould the relief, either directing the disciplinary/Appellate Authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof." (SCC p.762, para 18)

13. Therefore, we do not propose to issue a direction to the disciplinary/Appellate Authority to reconsider the penalty imposed. As pointed out by this Court in the above judgment and in order to appropriately mould the relief and to shorten the litigation, we ourselves impose the punishment of removal from service which was imposed by the disciplinary authority in the instant case which, in our view, is the appropriate punishment.

14. This Court in B.C.Chaturvedi v. Union of India further held that the Court/Tribunal cannot interfere with the findings of fact based on evidence and substitute its own independent findings and that where the findings of the disciplinary authority or the Appellate Authority are based on some evidence the Court/Tribunal cannot reappreciate the evidence and substitute its own findings. Observing further, this Court held that judicial review is not an appeal from a decision but a review of the manner in which the decision is made and that power of judicial review is meant to ensure that the individual receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in the eye of the Court. This Court further held as follows: (SCC p.759, paras 12-13)

When an inquiry is conducted on charges of misconduct by a public servant, the

> Court/Tribunal is concerned to determine whether the inquiry was held by a competent officer or whether rules of natural justice are complied with. Whether the findings or conclusions are based on some evidence, the authority entrusted with the power to hold inquiry has jurisdiction, power and authority to reach a finding of fact or conclusion. But that finding must be based on some evidence. Neither the technical rules of Evidence Act nor of proof of fact or evidence as defined therein, apply to disciplinary proceeding. Adequacy of evidence or reliability of evidence cannot be permitted to be canvassed before the Court/Tribunal. When the authority accepts the evidence and the conclusion receives support therefrom, the disciplinary authority is entitled to hold that the delinquent officer is guilty of the charge. The disciplinary authority is the sole judge of facts. Where appeal is presented, the Appellate Authority has co-extensive power to reappreciate the evidence or the nature of punishment. The Court/Tribunal in its power of judicial review does not act as Appellate Authority to reappreciate the evidence and to arrive at its own independent findings on the evidence. The Court/Tribunal may interfere where the authority held the proceedings against the delinquent officer in a manner inconsistent with the rules of natural justice or in violation of statutory rules prescribing the mode of inquiry or where the conclusion or finding reached by the disciplinary authority is based on no evidence. If the conclusion or finding be such as no reasonable person would have ever reached, the Court/Tribunal may interfere with the conclusion or the finding, and mould the relief so as to make it appropriate to the facts of that case."

13. The facts of this case are similar to the case in hand. The Supreme Court came to the conclusion that the punishment of removal imposed upon the

petitioner therein was absolutely correct and not disproportionate. Since the facts of the present case are similar, the same principles of law will apply in this case as well.

14. In **2002(1) GCD 815 (Guj) (Gordhanbhai C.Parmar v.Divisional Controller, G.S.R.T.C., Baroda)** this Court has upheld the penalty of dismissal of the petitioner therein, on the ground of unauthorised absence. The judgment cited by learned counsel for the petitioner in Sardarsingh Devisingh v. Dist.Supdt.of Police, Sabarkantha and Others (supra) has also been discussed and distinguished in para 6 of this judgment.

15. After a careful consideration of the arguments advanced and law cited by the parties, I am of the considered view that the proportionality of punishment can only be adjudged in the context of the factual matrix of the case. No general principles regarding whether, or not, the extreme punishment of removal should be imposed, can be formulated or applied universally, without adjudging whether they

are relevant to the facts and circumstances of that particular case or not. When a departmental inquiry is conducted as per rules and procedure, after following the principles of natural justice and after giving due opportunity to the delinquent, the competent authority entrusted with the power to hold the inquiry has the jurisdiction, power and authority, to reach a finding or a conclusion but that conclusion must be based upon the evidence on record applied to the factual position. On appeal being preferred, the appellate authority has co-extensive power to re-appreciate the evidence or the nature of punishment and either uphold the finding of the inquiry, or to modify/reject the same. If the inquiry does not suffer from any procedural defect, or lack of evidence and if there is no proved allegation of malafides, then the court, in its power of judicial review, cannot act as an appellate authority to re-appreciate the evidence and arrive at its own independent finding. In this case, the rules of natural justice have been observed and there is evidence on record on which the Inquiry Officer come to the conclusion regarding the guilt of the

petitioner. Besides this, there is no procedural defect in the conduct of the inquiry and neither is there any violation of statutory rules. In view of this, it is not a fit case in which a direction can be issued to the disciplinary/appellate authority, to re-consider the penalty imposed. Mere sympathy is not a ground on which the punishment of removal imposed upon the petitioner, can be interfered with.

16. For the foregoing reasons, this court is not inclined to interfere with the punishment imposed by the disciplinary authority and upheld by the appellate authority.

17. The writ petition is, therefore, dismissed. Rule is discharged. Interim relief, if any,stands vacated. There shall be no order as to costs.

(Smt.Abhilasha Kumari,J)

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